BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROGER M. LEWIS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-164
Case No. 74-5261

S.S.A. No.

OROWEAT BAKING COMPANY
(Employer)

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Referee's Decision No. ONT-7694

The Department appealed from the referee's decision which held that the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code on the ground that he had voluntarily left his most recent work without good cause. The employer's reserve account was relieved of charges under section 1032 of the code. We have considered the written arguments which have been submitted.

STATEMENT OF FACTS

The claimant worked for the employer as a shop helper from May 20 to May 24, 1974. His work shift was from 2 a.m. until 10 a.m. At the beginning of the shift on May 24 he was informed that he was to be laid off due to lack of work at the end of the shift that day. The claimant worked until his lunch hour. He then left and did not return to work the last three hours of his shift. He was not paid for the three hours that he did not work.

The claimant failed to return to work after lunch because he felt the employer had breached an agreement when it rehired him. The claimant previously had worked for the employer, was laid off, and obtained other work which he quit to return to the employer after obtaining an assurance that there would be some degree of permanency in the job.

The employer contends that the claimant's failure to return to work constitutes an intervening cause for his unemployment and that the termination of employment should be construed as a voluntary quit rather than a layoff. The employer cites our Appeals Board Decision No. P-B-101 in support of this contention.

REASONS FOR DECISION

Section 1256 of the code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant left his most recent work voluntarily without good cause, or if he has been discharged for misconduct connected with his most recent work.

In determining whether there has been a voluntary leaving or a discharge under section 1256 of the code, it must first be determined who was the moving party in terminating the employment relationship. If the claimant left employment while continued work was available, then the claimant is the moving party. If the employer refuses to permit an individual to continue working, although the individual is ready, willing and able to do so, then the employer is the moving party (Appeals Board Decision No. P-B-37).

In applying the above rule, we held in Appeals Board Decision No. P-B-101 that a claimant who left employment at approximately 11:30 a.m. on a day when his services were to be terminated at 5 p.m. had voluntarily left his most recent work because the employer expected the claimant to continue working until 5 p.m. and had paid him in advance for such services.

In the instant case the claimant was to be laid off due to lack of work at the end of his shift at 10 a.m. However, he did not return from his lunch hour and consequently did not work the last three hours of his shift. The question posed is whether the leaving of work three hours prior to the end of the shift was an effective intervening cause sufficient to alter the character of the termination. We believe the answer must be in the negative.

To strictly construe our holdings in Appeals Board Decisions Nos. P-B-37 and P-B-101 would result in unreasonable application of section 1256 of the code. For example, the employer informs an employee that his services will no longer be required after 5 p.m. on a specific date. The employee then leaves work at 4:59 p.m. while continued work to 5 p.m. is available to him. It would be a ridiculous result to conclude that because the claimant left work one minute before the end of his shift, he became the moving party.

Reason demands that our Appeals Board Decisions Nos. P-B-37 and P-B-101 be limited to those situations where the claimant leaves work prior to the effective date or day of termination of employment by the employer. Where the leaving occurs on the effective day of the termination by the employer, it does not constitute an intervening cause or reason for the claimant's unemployment sufficient to alter the character of the termination. Appeals Board Decision No. P-B-101 accordingly is overruled to the extent that it conflicts with these views.

On the basis of the above reasoning, we conclude that this claimant's leaving of work approximately three hours before the effective time of his layoff did not alter the character of the termination. We hold that the claimant was laid off due to lack of work and that therefore the disqualifying provisions of section 1256 of the code are not applicable.

We believe that the same reasoning also applies to those situations where the claimant quits and the employer accelerates the termination on the effective date or day of termination.

DECISION

The decision of the referee is reversed. The claimant is not subject to disqualification under section 1256 of the code. The employer's reserve account is not relieved of charges under section 1032 of the code.

Sacramento, California, November 12, 1974

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

EWING HASS, Chairman

DON BLEWETT

CARL A. BRITSCHGI

CONCURRING - Written Opinions Attached

JOHN B. WEISS

HARRY K. GRAFE

CONCURRING OPINION

I concur in part:

It is with reluctance that I concur in this decision adopting a new administrative rule of convenience, because in its application it necessarily will apply too broad a brush, thus spawning new inequities.

I firmly believe in the basic underlying principle of Precedent Decision No. P-B-101 which is to squarely place responsibility at the precise moment the employment relationship actually ends upon that party who causes severance of the relationship at that moment.

In Appeals Board Decision No. P-B-101 the employer was willing to provide work and pay, and in exchange was entitled to expect services up until the moment he had appointed for the anticipated termination. However that claimant, having accepted the pay in advance, for no persuasively compelling reason elected to accelerate the termination by not returning from lunch. This volitional act constituted an intervening cause or reason for the claimant's unemployment and altered the character of the termination. Certainly the rationale behind Appeals Board Decision No. P-B-101 is reflective of the proximate cause doctrine and is logical. Accordingly, I cannot accept the expression in the majority opinion that:

> "Reason demands that our Appeals Board Decisions Nos. P-B-37 and P-B-101 be limited to those situations where the claimant leaves work prior to the effective date or day of termination of employment by the employer."

However, in law it is axiomatic that 'hard cases make bad law,' and in the application of Appeals Board Decision No. P-B-101 to some factual situations, harsh and uncomfortable results have issued. In my opinion these could be handled by intelligent application of criteria for "good cause," but apparently I stand alone in this view. In the spirit of cooperation in attempting to round off the more abrasive edges of Appeals Board Decision No. P-B-101 so that it will cut less extremely in those borderline instances where little time loss, expense, inconvenience, or inequity results to the employer deprived of the expected services that last day, I have concurred in the decision in this case. By it I do not repeal Appeals Board Decision No. P-B-101, but merely limit its thrust to those borderline areas mentioned.

Search of the meager case law and foreign board decisions does not really aid us, and we are forced to rely upon our own experience since Appeals Board Decision No. P-B-101 was issued. I have reservations that this administrative rule of convenience can stand judicial test - as stated above, it is not rooted in logic or reason, but is purely a matter of expediency.

Reluctantly accepting this, and recognizing that equal application is essential to fairness, I have also concurred in the application of this same rule of convenience to other situations where the claimant has resigned and the employer elects to accelerate the termination on the effective day or day of the resignation.

JOHN B. WEISS

CONCURRING OPINION

I concur in the result reached by my fellow board members in this case, but I depart somewhat from the precedent position being articulated by the majority. Prefatorily, let it be known that I find great difficulty in accepting the dogma established by Appeals Board Decision No. P-B-101. Yet, I am reluctant summarily to wipe Appeals Board Decision No. P-B-101 from the books unless and until the board has shaped and defined rules of law to fill the void that would result from such erasure. I hope and I trust that the instant matter will be the first adventure by the board into that eventual void, and that as new or recurring factual matrices present themselves, we will further delineate and demarcate the ground rules that will guide employers, their employees, the Department and our referees through the thorny thicket of notice/leaving situations.

One of the fundamental faults I find with Appeals Board Decision No. P-B-101 is the overreach of its principle. Therein, a rather mundane and limited set of facts existed; however, the rule that was confected was given sweeping, universal application to virtually every factual matrix in the vast area of notice/leaving situations. In charting any new course through these choppy seas, I am unwilling to adopt a broad-brush approach, and rather I prefer to examine the compartmentalized factual circumstances that continue to arise, and to attempt to fashion more precise rules that are responsive to such sets of facts. Hence, in the matter before us, I would construct a principle limited to the same-day-notice facts which are presented. I would not extend or expand the precedent beyond the perimeter of those facts, and would wait for yet another case involving different facts to write a rule applicable to that different situation.

The factual matrix presently confronting us is one in which the employer gives notice to the employee that the latter's services will not be needed beyond the day or shift upon which such notice is given. At some point prior to the natural, normal conclusion of that workday or shift the employee leaves the job. This leaving may occur at any time from the instant that notice is given by the employer up to a few moments before the normal end of the workday or shift: the result is the same. Where these facts exist - and absent the occurrence of some substantive, intervening facts - the rule should be that the proximate causation of the employee's unemployment is the notice of termination which was issued on that day by the employer.

Predicated on the facts presented to us, we need decide no more than this. Given a case when advance termination notice is given two days, three days, a week, two weeks, a month or whatever, when the totality of such facts is ripe for our adjudication will we then have ample occasion and justification for publishing a precedental rule thereupon.

HARRY K. GRAFE